**Reigel Electric/Central Electrical Services (Alter Ego and/or Successor) *and* Local 577, International Brotherhood of Electrical Workers.** Case 30–CA–15265(E)

August 24, 2004

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On May 27, 2004, Chief Administrative Law Judge Robert A. Giannasi issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Applicant filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge.

Dated, Washington, D.C. August 24, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Paul Bosanac, Esq.*, for the General Counsel.
*Kevin J. Kinney, Esq.* and *Timothy C. Kamin, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

SUPPLEMENTAL DECISION AND ORDER GRANTING MOTION TO DISMISS APPLICATION

On February 11, 2004, the Board issued its decision and order in this case, affirming the decision of Judge Irwin H. Socoloff. 341 NLRB No. 3 (2004). Judge Socoloff had dismissed allegations that Respondent Central was a single employer with, or the alter ego or successor of, Respondent Reigel Electric and thus obligated to continue the bargaining relationship between Reigel Electric and Charging Party Union. The judge also dismissed allegations that Central discriminatorily failed to hire the union employees of Reigel Electric upon the latter's dissolution and that Central's owner, Dan Reigel, made a coercive statement in violation of the Act. The judge did, however, find that Reigel Electric violated the Act by failing to provide and delaying in providing relevant information to the Union about the relationship of Reigel Electric to Central.

On March 12, 2004, Respondent filed an application for costs and fees pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504, and Section 102.143 through 102.155 of the Board's Rules and Regulations. On April 21, 2004, the General Counsel filed a motion to dismiss the application on two procedural grounds and on the ground that the complaint and the subsequent litigation were "substantially justified" under the applicable law, regulations, and authorities. On May 11, 2004, Respondent submitted a response to the motion to dismiss. Because I find that the General Counsel was substantially justified in issuing the complaint and litigating the case at all stages, I grant the motion to dismiss and reject the application.[1]

I. THE UNDERLYING CASE

The pivotal and most important issue in the case was whether Central and Reigel Electric were alter egos or constituted a single employer. The Board finds alter ego status between two entities if they have "substantially identical management, business purpose, operations, customers, equipment, and supervision." Other factors include common ownership or control, familial relationships, lack of arm's length dealings between the two entities and whether one entity was formed or used to avoid union obligations. No one factor is controlling. *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988), enfd. 888 F.2d 125 (2d Cir. 1989), and cases there cited. Similarly, the Board has set forth the following "four factors [for] determining whether separate entities constitute a single employer: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. No one factor is controlling, nor do all need to be present to support a single employer finding. However, the Board has held that the first three factors are more critical than the last, and, further, that centralized control of labor relations is of particular importance because it tends to demonstrate 'operational integration.' Single employer status is characterized by the absence of an arm's length relationship found among unintegrated companies [citations omitted]." *RBE Electronics of S.D., Inc*., 320 NLRB 80 (1995).

Judge Socoloff found that Central and Reigel Electric had the same business purpose, a similar type of operation and the same supervision; he also found that the firms operated from the same location, property owned by Lyle Reigel, with the same equipment and in the same market. But he found no interrelationship of operations and no centralized control because Lyle Reigel controlled management functions, set policy and handled the labor relations of Reigel Electric, whereas, his son, Dan, handled these matters for Central. Judge Socoloff found

[1] Because Judge Socoloff has retired and is unavailable to handle the EAJA case, I assigned it to myself under Sec. 102.36 of the Board's Rules and Regulations.

separate ownership and control of the two enterprises, and no evidence that Central was formed for other than legitimate reasons or that there were inappropriate dealings between the two companies. He therefore found no alter ego relationship. 341 supra at slip op. p. 4. Relying on the same evidence, and because there was "a lack of common management, centralized control of labor relations, interrelationship of operations or common ownership or control of the two businesses," within the meaning of *RBE Electronics*, supra, he also found no single employer relationship. Id. at slip op. p. 5.

The evidence shows that Reigel Electric, an employer subject to a collective-bargaining agreement with the Union, was 77 percent owned by Lyle Reigel and 23 percent owned by his son, Dan.[2] Lyle Reigel was the president of Reigel Electric and Dan Reigel was vice president. Dan Reigel's ownership interest in Reigel Electric was based on intermittent gifts of stock over a period of years. Reigel Electric was dissolved on June 1, 2000. Central was formed that same day, with Dan Reigel holding all the stock and being designated as president. Five other former Reigel Electric employees joined Dan at Central and two new employees were hired. The three remaining union electricians at Reigel Electric were laid off and Central began operations as a nonunion company. Upon the dissolution of Reigel Electric, Dan Reigel received, as his portion of the assets, a return of capital valued at $172,151 (GC Exh. 20). This was composed of inventory, property and equipment of Reigel Electric, valued at $100,452, which was immediately transferred to Central, as well as a note reflecting monies that Dan Reigel owed Reigel Electric, and a cash distribution. Ibid.

## II. DISCUSSION AND ANALYSIS

Substantial justification for EAJA purposes means a position justified to a degree that could satisfy a reasonable person. *David Allen Co.*, 335 NLRB 783, 784 (2001), citing applicable authorities. The substantial justification standard does not require the Government to establish that its decision to litigate was based on substantial probability of prevailing and the Government's position can be deemed reasonable even if the General Counsel failed to establish a prima facie case. Substantial justification may be found where the General Counsel proceeds on the basis of legitimate credibility issues, including documents and other objective evidence obtained in the investigatory stage of the proceeding. Ibid. Moreover, "[f]ee determinations under EAJA are to be made by examining the case as an 'inclusive whole.'" *Fantasia Fresh Juice Co.*, 339 NLRB No. 112, slip op. p. 2 (2003), and cases there cited.

In the instant case, the judge credited the testimony of Lyle and Dan Reigel that Dan's duties at Reigel Electric "were limited to estimating and purchasing" and "he did not exercise management functions and was not responsible for any aspects of labor relations matters." Slip op. p. 3. He also found, in effect, that the transaction dissolving Reigel Electric and creating Central was at arm's length. But, on those crucial issues, and, on this record, the judge could reasonably have discredited Lyle and Dan Reigel and made contrary findings. See *Mar-Kay Cartage*, 277 NLRB 1335, 1340 (1985) (a judge may not only discredit a witness but believe the opposite of his testimony, citing Supreme Court authority). Indeed, consideration of the entire record, including the documentary evidence, would reasonably permit the inference that Reigel Electric and Central were alter egos or a single employer.

For example, the Reigels convinced Judge Socoloff that Dan's duties at Reigel Electric were limited to estimating and purchasing. But Dan Reigel was also vice president of Reigel Electric. Dan did not put a penny of his own money in Reigel Electric; his 23 percent interest was the result of gifts from his father over a period of years (Tr. 102). Moreover, pursuant to 1991 resolutions (GC Exh. 14), Dan and Lyle were the only individuals with the authority to execute contracts on behalf of Reigel Electric. Although Dan Reigel carried a salary of $1 more than the pay of a journeyman electrician, he received what Judge Socoloff called "very sizeable bonuses" based on profits. Slip op. p. 3. That alone would reasonably support a finding that Dan Reigel was more than simply an estimator and purchaser, and, in reality, a member of management. There is no evidence that anyone else, with the possible exception of Lyle, received bonuses based on profits. The amounts of Dan Reigel's compensation themselves are an indication of management responsibilities commensurate with his title. According to a table set forth in the General Counsel's brief to the Board in this case (Brief at 11, based on GC Exh. 29), in the last 2-1/2 years of Reigel Electric's existence, Dan Reigel earned a total of $447,209, compared to a total for Lyle Reigel of $663,585 and a total for Supervisor-Foreman Tom Giesen of $151,688. Indeed, despite the familial relationship with Lyle, his gifted ownership interest, title, contractual authority and compensation, Dan Reigel denied being a member of management. On cross-examination, counsel for the General Counsel confronted him with his pretrial affidavit, in which Dan admitted that, after several years working as an electrician for his father's company, in 1984, he "went to work in management at Reigel Electric." That statement was not negated by the next sentence in the affidavit, which stated that, at that point, he began training as an "estimator." Tr. 164–165. Based on the evidence discussed above, it would have been more than reasonable for a judge to discredit the contrary testimony of Lyle and Dan Reigel and conclude that Dan Reigel was indeed a member of the management of Reigel Electric.

The evidence of Dan Reigel's involvement in labor relations, especially in the last few years of Reigel Electric's existence,[3]

[2] The testimony of Dan and Lyle Reigel and the judge's decision list the percentages as 78 and 22; but the documentary evidence submitted in connection with the dissolution of Reigel Electric sets the percentages at 77.133 for Lyle and 22.867 for Dan (GC Exh. 20).

[3] The record contains a series of letters from Lyle Reigel to the Union on various matters from about 1990 through 1997 (GC Exh. 19, Tr. 72). Letters to the Union thereafter are signed by Dan Reigel, as shown below. There is also evidence that Lyle at one time signed apprentice-reporting forms, a matter also discussed below, but, between 1997 and 2000, Dan signed those forms (Tr. 391–395, GC Exh. 36). As the judge found (Slip op. p. 3), Lyle and Dan started talking about somehow transferring the business to Dan "[d]uring 1999." It also appears that Lyle Reigel spent much of his time working on matters for one of his other businesses, U.S. Paper Converters (Tr. 32, 38, 84). In these circumstances, it would be reasonable to infer that, at least during the

is certainly enough to reasonably permit an inference that he responsibly handled labor relations for Reigel Electric. This is particularly so because, as indicated above, he could reasonably be viewed as a member of management. First, as a small company, Reigel Electric did not separately negotiate an agreement with the Union. It was at one point a member of a multiemployer association that dealt with the Union, but more recently it simply signed a letter of assent, agreeing in effect to abide by the multiemployer agreement with the Union. Reigel Electric last signed such a letter of assent in 1990 (Tr. 130). Thus, involvement in labor relations for Reigel Electric essentially meant dealing with the Union on contract interpretation, grievance issues or deciding upon the need for and requesting personnel from the Union. Significantly, Dan and Lyle Reigel denied that Dan handled any labor relations matters for Reigel Electric (Tr. 25, 173). But the General Counsel introduced documentary evidence that clearly called into question that blanket denial and reasonably warranted discrediting their testimony and supporting the General Counsel's position that Dan Reigel was responsible for labor relations. The judge rejected the General Counsel's position in a footnote (Slip op. p. 3 fn. 3). It would have been reasonable, however, to make a contrary inference both on credibility grounds and on the extent of Dan's involvement in the labor relations of Reigel Electric.

The judge referred to some, but not all, of the General Counsel's evidence of Dan Reigel's involvement in labor relations for Reigel Electric: "In 1998, Dan Reigel signed a letter to the Union concerning a grievance, which had been drafted by his father, as Lyle Reigel was not there to sign it." What is omitted is that the letter from the Union, dated February 4, 1998, which prompted Dan Reigel's response, was addressed to Reigel Electric, attention Dan Reigel, in the form, "Dear Dan." GC Exh. 23. The record includes one other letter from the Union, dated April 5, 1999, also addressed to "Dan." GC Exh. 24. Dan Reigel's response to the Union's letter of February 4, which discusses application of the labor agreement, shows on its face that it is from Dan, who signed the letter over his typed name and title. GC Exh. 23. The typist's notation clearly indicates that the letter was written by Dan, not Lyle, Reigel; other letters in the record show a difference in the typist's notation depending on who wrote the letters (see GC Exhs. 19, 24). In rejecting the objective content and context of the 1998 letter, the judge made a credibility determination, accepting Dan's testimony that he signed the letter drafted by his father because his father was not available to sign it. It would have been reasonable for the judge to come out the other way.

The judge also gave little or no weight to evidence that Dan Reigel attended grievance meetings because he found that, on the one occasion he did so, while dealing with an apprenticeship matter, he acted as a substitute for his father, as Lyle Reigel testified. But the documentary evidence relied upon by the General Counsel clearly permitted the inference that Dan Reigel was Reigel Electric's labor relations representative at that meeting. The General Counsel introduced a copy of the minutes of a grievance meeting between Union and employer representatives on September 10,1997. GC Exh. 37. The minutes state that Dan Reigel appeared for Reigel Electric, and Dan described, in great detail, the duties of the apprentice, who, the Union apparently alleged, was doing journeyman work. Dan made the point that the apprentice's work did not directly involve electricity, but that it provided a "good learning experience." There is no indication in the minutes that Dan was substituting for his father. In his decision, the judge only mentioned the apprenticeship grievance. But the minutes of the September 10 meeting show that there was a second grievance discussed by Dan Reigel, which was not addressed in Lyle Reigel's testimony or by the judge. That grievance involved a request for manpower. According to the minutes, Dan Reigel said he had called the union hall to see if teledata people were available. None were available so he used a material handler instead of a teledata person. Dan Reigel's participation in this grievance meeting not only shows his involvement in labor relations for Reigel Electric, but it also shows that he reassigned employees based on his judgment, thus reasonably permitting a rejection of testimony that he did not handle labor relations. The minutes of this meeting, which have an inherent reliability because they were prepared years before the events and the litigation of this case, also bear on the judge's finding, discussed below, about Dan Reigel's handling of apprenticeship issues.

The judge stated that Dan Reigel "sometimes filled out and signed apprentice reporting forms as a convenience to requesting apprentices, a ministerial act." Those forms, covering a period of about the last 3 years of Reigel Electric's existence (GC Exh. 36), were introduced in evidence. All were signed by Dan Reigel as the employer's representative. Contrary to the judge, it would have been reasonable to view the forms as more than simply a convenience to requesting apprentices or ministerial acts.[4] They include evaluations by Dan Reigel of Reigel Electric apprentices on several job-related factors, including attitude, craftsmanship, and mechanical and electrical ability. The forms also clearly indicate that the evaluations are used by the apprenticeship committee to advance apprentices through the apprentice program and to increase their pay accordingly. Indeed, an official from the apprenticeship committee confirmed that this was the purpose of the evaluations (Tr. 391–395). This evidence also reasonably supports the inference that Dan Reigel handled labor relations functions for Reigel Electric, contrary to his testimony and that of his father.

The judge also rejected the General Counsel's contention that the transaction surrounding the dissolution of Reigel Electric and the formation of Central on the same day was not at arm's length. Focusing only on the transfer of Reigel Electric's inventory, property, and equipment to Dan Reigel and Central, he concluded that the transfer was at arm's length because the property was transferred at book value and "may not have had an ascertainable market value," notwithstanding that "an item-

last portion of Reigel Electric's existence, Lyle was ceding some of his responsibilities to his son.

[4] In this respect, it appears that the judge may have confused apprentice reporting forms, which included evaluations by Dan Reigel (GC Exh. 36), with another form titled "Request for Men," which identified the person making the request, including, at times, Dan Reigel (GC Exh. 38).

ized list of the transferred property had not been completed at the time possession passed." Slip op. p. 5. But consideration of all of the evidence on this issue could reasonably have led to the opposite inference, namely, that the transaction was not at arm's length. Dan Reigel was gifted his interest in Reigel Electric from his father, Lyle. It was reasonable to infer that Dan Reigel used the capital distributed to him upon the dissolution of Reigel Electric as capital to form Central.[5] As part of his interest, Dan received what was represented by Lyle Reigel as the "book value" of *all* of the inventory, property, and equipment of Reigel Electric. Tr. 76. But Lyle Reigel admitted (Tr. 77, 122–123) that he, Lyle, also received some property and equipment at the time of dissolution, contrary to the document reflecting the distribution of Reigel Electric's assets (GC Exh. 20). Nor was any bill of sale, invoice, or other documentary support produced for any transfer of property to Lyle. More importantly, no itemized list of the inventory, property, and equipment transferred to Dan Reigel and Central was ever produced. The General Counsel's point was not that such a list was not prepared at the time "possession passed," but that such a list was never prepared and, of course, never produced at trial. There was thus no way to authenticate the book value of the property transferred to Dan Reigel and Central. On this record, it would have been reasonable to infer that these were the types of "irregularities" that the Board has found to militate against an arm's length transaction. See *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). Similarly, the capital used by Dan Reigel in forming Central could reasonably be viewed as having been originally gifted to him by his father, another indicia that the transaction was less than arm's length. See *Kenmore Contracting Co.*, supra at 337.

Perhaps the most significant evidence of alter ego or single employer status revolves around one of Central's first jobs as a separate entity, evidence that the judge did not mention in his decision. At the beginning of its operations, Central handled one job that Reigel Electric had bid on some 2 weeks before its dissolution. On May 17, 2000, Dan Reigel had submitted a bid on work at the Fox Cities Racquet Club for Hoffman Corporation. Hoffman apparently accepted the bid, and, sometime in July, its agent, Scott Fleming, called Dan Reigel about doing the job. Dan told Fleming that Reigel Electric was out of business, but that he had formed a new company, Central, and that Central was interested in doing the job (Tr. 144–146). Dan Reigel then submitted a bid for the job on behalf of Central. That bid carried the same date, May 17, 2000, as the Reigel Electric bid (GC Exh. 27), although it is clear from other evidence (R. Exh. 2 and Tr. 150–151) that the Central bid was submitted on or about July 17, 2000. The deadline for submitting bids for the Racquet Club job was May 17, 2000 (GC Exh. 27). Dan Reigel's bid on behalf of Central was for the exact same work and the same amount as his bid on behalf of Reigel Electric (Tr. 146). Hoffman accepted the Central bid and Central performed the work using nonunion labor. From this evidence, it would have been reasonable for the judge to find that Hoffman permitted Dan Reigel to submit an untimely bid to perform work under Central that he had timely bid for under Reigel Electric, thus allowing Dan to do the job without following the union contract that would have bound Reigel Electric. Because it was also reasonable to infer that, in substance if not in form, Hoffman regarded Central as the same entity as Reigel Electric, it would have been reasonable for the judge to conclude that Reigel Electric and Central were alter egos.[6]

All of the above provides a reasonable basis for finding alter ego and single employer status, and for discrediting the testimony of Lyle and Dan Reigel. In these circumstances, I find that the General Counsel was substantially justified in alleging alter ego and single employer status and litigating that aspect of the case through all stages of the proceeding. The other allegations are so interrelated to the alter ego and single employer issues that it was reasonable to include them, thus providing substantial justification for the General Counsel doing so. For example, Dan Reigel's statement that he was going nonunion and his failure to hire Reigel Electric's union work force not only provided a reasonable basis for independent allegations of successorship, discriminatory failure to hire, and coercion, but also reasonably supported the allegation that the dissolution of Reigel Electric and the formation of Central was based on a desire to avoid union representation, an element of alter ego status, although, as the judge pointed out, not the sine qua non of such a finding. As indicated above, the judge found a violation in the failure to provide and the delay in providing the Union information concerning Central's relationship with Reigel Electric. In this respect, the judge found that the Union "had an objective factual basis for believing that" Reigel Electric and Central "constituted a single employer, or that Central was the alter ego of Reigel." Slip op. p. 4. Thus, by examining the case as an "inclusive whole," I find that the General Counsel was substantially justified in his "overall position in the case." *Fantasia Fresh Juice*, supra, slip op. p. 2.[7]

[5] As the judge found, upon the dissolution of Reigel Electric, Dan received tangible assets, in the form of inventory, property, and equipment, in the value of $100,452, and liquid assets of $71, 699 (slip op. p. 3). It is unclear whether Dan invested any additional capital to form Central. He did testify that he received cash from equity in his residence to obtain a line of credit (Tr. 243–245), but no documents or other details were provided with respect to that testimony so it can not be determined whether, when, or under what circumstances, this transaction had anything to do with an infusion of capital.

[6] Within weeks of Central's formation, it started performing other work through Hoffman. GC Exh. 41. Dan Reigel was contacted to perform this work based on his past association with Reigel Electric. He was, for example, contacted to do additional work for the Omor School District, for which Reigel Electric had performed work from the summer of 1999 through March 2000. See Tr. 218–220, 228; and 374–377, 378–379, 381–383. In June and July of 2000, Central used the nonunion labor of Thomas Electrical Services to perform some of its jobs. Thomas paid those employees, subject to reimbursement by Central, but they used Central tools, were supervised by Central personnel and drove a Central truck to their jobs, sometimes from the Central office location (Tr. 157–159, 202–203, 340–343, 346).

[7] The above analysis applies as well to the General Counsel's appeal of Judge Socoloff's decision. Respondent's reliance (Response at 9) on *Fantasia Fresh Juice*, supra, is unavailing on this point. In that case, the Board found that the General Counsel was not substantially justified in filing unsuccessful credibility-based exceptions. But the Board stated that it was not suggesting "that there can never be substantial

In sum, I find that the General Counsel was substantially justified in issuing the entire complaint in this case and in litigating all phases of the case before the Board. The General Counsel's motion to dismiss the application for costs and fees is therefore granted and the application is denied.[8]

Dated, Washington, D.C. May 27, 2004

justification for filing unsuccessful credibility-based exceptions, only that such justification was lacking here." Slip op. p. 1. In contrast to the situation in *Fantasia Fresh Juice*, here, the General Counsel, relying on documentary and other objective evidence, was substantially justified not only in litigating the case before the administrative law judge, but also in appealing his adverse decision to the Board.

[8] In view of my disposition of the matter based on the substantial justification issue, I do not reach the other grounds set forth in the General Counsel's motion to dismiss—that the attorney's fees charged were above the limits set forth in the Board's Rules and Regulations and included work on matters, namely, the information request, on which the Respondent did not prevail.